No. 76-10

In the Supreme Court of the United States

OCTOBER TERM, 1976

CARL DENNIS CUTTING AND BARRY DANIEL STILL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. 10-28) is reported at 538 F. 2d 835. The earlier opinion of a panel of the court of appeals (Pet. App. 2-9) is unreported.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on June 16, 1976. The petition for a writ of certiorari was filed on July 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the photographs of nudes involved in this case are obscene under the standards of *Roth* v. *United States*, 354 U.S. 476, as modified by the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413.

2. Whether 18 U.S.C. 1461 was unconstitutionally vague prior to *Miller* v. *California*, 413 U.S. 15.

3. Whether petitioners, who were convicted prior to *Miller*, are entitled to a hearing to determine whether the proper "community standard" was applied to their case.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioners were convicted of multiple counts of mailing obscene material, in violation of 18 U.S.C. 1461. Each was sentenced to three years' probation.

The parties stipulated at trial that petitioners knowingly mailed the materials, which comprise advertisements and a film (Tr. 82-83). The mailings, made in Los Angeles County, California, went to addresses throughout the Nation. The advertisements offered photographs for sale. The advertisements upon which 13 counts are based depict nude females and a nude male; each model is posed to display the genitals, but no model is engaged in sexual activity, actual or simulated (Exhs. 1-9, 16-17). The other advertisements and the film contain explicit depictions of intercourse, fellatio and cunnilingus (Exhs. 10-13, 20; Tr. 216). Ten of the advertisements were not solicited by their recipients (Tr. 85-86, 88-90, 98, 111, 116-117, 132, 137, 157). Thirteen of the advertisements were mailed to minors (Tr. 84, 98, 109-110, 125-126, 135, 150, 165-166, 167, 178-180).

Petitioner Still testified that he and petitioner Cutting engaged as partners in a mail order business until October 1969 (Tr. 282-283). He testified that he did not mail items to anyone who had never inquired about similar materials (Tr. 288), and that he mailed 8,000 to 10,000 advertisements each month (Tr. 297). Petitioner Cutting testified that he engaged in the mail order business (Tr. 314-315), that he did not knowingly mail unsolicited items (Tr. 324), and that he mailed approximately 10,000 advertisements each month (Tr. 340-341).

Petitioners were tried in April 1971. The jury was instructed under the then-prevailing standards of *Memoirs* v. *Massachusetts*, 383 U.S. 413, that the materials could be found obscene only if they appealed to the prurient interest, were patently offensive under national community standards, and were utterly without redeeming social value (Tr. 445-447). During the pendency of petitioners' appeals this Court decided *Miller* v. *California*, 413 U.S. 15, and *Hamling* v. *United States*, 418 U.S. 87.

A panel of the court of appeals reversed the convictions on the 13 counts relating to petitioners' mailing of advertisements not depicting sexual activity. Relying on pre-*Miller* decisions holding similar materials not to be obscene, the panel concluded that the advertisements did not appeal to the prurient interest and were not patently offensive (Pet. App. 4).[1] The panel rejected

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[1]Petitioners' conviction on an additional count also was reversed, both initially and upon rehearing, and is not at issue here. Petitioners were charged in that count with mailing information on how to obtain obscene materials. The relevant advertisement contained no photographs, and no evidence of the nature of the particular materials advertised was introduced at trial. See Pet. App. 3-4, 22, 29.

the argument that the advertisements constituted pandering, both because many of the recipients had requested these or similar materials and because petitioners had attempted to limit distribution to adults (Pet. App. 4). The panel concluded that the materials explicitly depicting sexual activities (involved in five counts pertaining only to petitioner Cutting) might properly be held to be obscene. The panel remanded the case for an evidentiary hearing to determine whether local standards were more or less strict than national standards (Pet. App. 6). One judge disagreed with this disposition; he would have affirmed these five convictions outright (Pet. App. 7-9).

The United States sought rehearing *en banc* limited to the question that had divided the panel—whether a hearing was required to determine whether local standards were different from national standards. The court granted rehearing *en banc* as to the entire case, however, and affirmed petitioners' convictions.[2]

The court concluded that the advertisements depicting provocatively posed solitary nudes were to be assessed under the standards of *Roth* v. *United States*, 354 U.S. 476, as modified by the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413, unless the defendants would benefit from the revision of that test in more recent decisions. Pet. App. 11. The court observed that the jury at petitioners' trial had been charged under the *Roth-Memoirs* standards, and that the photographs lacked any accompanying text and did not have any pretense of artistic, scientific or literary value. After finding that the photographs were "so posed that a jury could quickly find that the sole purpose was to emphasize a lewd portrayal of genitals" (Pet. App.

[2]With one exception. See note 1, *supra*.

16-17), the court held that the jury could properly conclude that they are obscene.

The court also held that there was no need for a remand to compare local and national standards, because petitioners could not have been prejudiced by the reference to national standards in the trial court's instructions to the jury (Pet. App. 17-22).

Five judges, dissenting, would have held that the materials not depicting sexual acts were not obscene (Pet. App. 22-24). Four judges would have remanded the case for an inquiry into the difference between local and national standards (Pet. App. 24-28).

ARGUMENT

1. Petitioners contend (Pet. 7-9) that their convictions for distributing advertisements that do not depict actual or simulated sexual activity cannot stand. The argument is unpersuasive. As the court of appeals recognized (Pet. App. 11), and as we have conceded in *Marks* v. *United States*, No. 75-708, argued November 1 and 2, 1976, the convictions here must be tested under the *Roth-Memoirs* standards, which are more difficult for the prosecution to meet than are those enunciated in *Miller* v. *California*, 413 U.S. 15. Petitioners point out, as did the dissenting judges below (Pet. App. 23), that prior to *Miller* this Court reversed many convictions involving essentially similar materials. In fact, so far as we can determine, between *Memoirs* and *Miller* this Court did not uphold (or even deny review of) any conviction for disseminating materials that did not depict sexual activities. See, *e.g.*, *Central Magazine Sales, Ltd.* v. *United States*, 389 U.S. 50, reversing 373 F. 2d 633 (C.A. 4). See also *Jenkins* v. *Georgia*, 418 U.S. 153; *Bucolo* v. *Florida*, 421 927.[3]

[3]Cf. *Bucolo* v. *Adkins*, 424 U.S. 641.

We submit, however, that the jury was entitled to conclude that the advertisements were obscene. As Mr. Justice Holmes put it, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash* v. *United States*, 229 U.S. 373, 377. Here, as in *Hamling* v. *United States*, 418 U.S. 87, 126-127, the materials speak for themselves, and a judicial determination that similar materials are not obscene does not necessarily mean that these materials are not obscene.

The jury at petitioners' trial was instructed to apply the *Roth-Memoirs* standards. Its verdict of guilty therefore represents its judgment that the advertisements are patently offensive, that they appeal to the prurient interest, and that they are utterly without redeeming value. The court of appeals scrutinized the materials under both the *Roth-Memoirs* test and the *Miller* test; it, too, concluded that the materials are obscene. Although five judges thought otherwise, their disagreement with their colleagues was not based upon the "utterly without redeeming value" standard of *Memoirs*. The dissenting judges wrote that they could "discern no redeeming social value in these photographs" (Pet. App. 22); such differences as there are between the *Miller* formulation and the *Roth-Memoirs* standards therefore do not control this case. It turns, instead, on an evaluation of elements included in both the *Roth-Memoirs* test and the *Miller* test: whether the advertisements appeal to the prurient interest and whether they are patently offensive.

Questions concerning what appeals to the prurient interest, and what is patently offensive, are "essentially questions of fact." *Miller*, *supra*, 413 U.S. at 30. See also *Jenkins* v. *Georgia*, *supra*, 418 U.S. at 159-160. Although the factual decisions of a jury in this regard

are not immune from scrutiny, as *Jenkins* makes clear, neither do they require plenary review by this Court except in extraordinary cases. "Obscenity cases, like others, are not immune from the standards generally governing the exercise of our appellate jurisdiction. The Court has never indicated that plenary review is mandatory in every case dealing with the issue of obscenity." *J-R Distributors, Inc.* v. *Washington*, 418 U.S. 949, 950 (opinion of White, J.).[4] The factual question here indisputably was a close and difficult one. The judges of the court of appeals divided eight to five over its resolution. It was, we submit, a decision within the province of the jury. Unlike the film at issue in *Jenkins*, the advertisements here concentrated on a lewd exhibition of the genitals. They did not include depictions of sexual activity, but that should not be enough, as a matter of law, to bar a jury from concluding that they appeal to the prurient interest and are patently offensive.

2. Petitioners' argument that 18 U.S.C. 1461 was unconstitutionally vague prior to *Miller* is foreclosed by *Hamling* v. *United States*, *supra*, 418 U.S. at 99, 116-117.

3. Petitioners' claim that their case should have been remanded for a hearing to inquire into any differences between national and local standards also is foreclosed by *Hamling*. Like this case, *Hamling* involved convictions that had been obtained before *Miller* under a jury charge

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[4]We have conceded in *Marks* that if a question concerning obscenity *vel non* is properly preserved in the trial court, and if the testimony or a stipulation at trial does not adequately present the allegedly obscene materials in context, an appellate court must examine the materials in order to discharge its statutory duty fully to consider every issue presented on appeal. This does not pertain to this Court, however, for this Court does not have a statutory duty to hear and determine every question presented to it.

referring to "national" standards. The Court concluded that, although the jury should be instructed to refer to some smaller, more readily ascertainable "community," a reference to national standards would not flaw the convictions unless "there is a probability that the excision of the references to the 'nation as a whole' in the instruction dealing with community standards would have materially affected the deliberations of the jury." *Hamling, supra,* 418 U.S. at 108.

The court of appeals correctly concluded that "the jury deliberations in this case would not have been materially affected by excision of references to the national standard" (Pet. App. 17). The reasoning of the dissenting judges that there might have been some effect was based upon the supposition that the "community standards" instructions are designed to differentiate the sensibilities of one particular community from those of another community. The majority of the *en banc* court correctly held that this reasoning is insufficient for two reasons: first, the "excision" of the reference to national standards would not have produced a reference to some other standard—it would instead have left the jury to determine a community "without further specification," a course the Court approved in *Jenkins, supra,* 418 U.S. at 157; second, the dissenters' position misconceives the purpose of the community standards instruction. See Pet. App. 19:

> The purpose of the "community standards" instruction is not to distinguish attitudes in one area from those in another, but rather to distinguish personal or aberrant views from the generalized view of the community at large. Instructions referring to the nation as a whole may serve this purpose.

Petitioners have not argued that the instructions in this case failed to direct the jury to "distinguish personal

or aberrant views from the generalized view of the community at large." There was accordingly no prejudice and no need for a further hearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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